United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7531

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S.

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VINCENT J. BELLOWS, :

Plaintiff-Appellee, :

-against- :

DENNIS DAIHACK and BRIAN VAN HOUTEN, :

Defendants-Appellants. :

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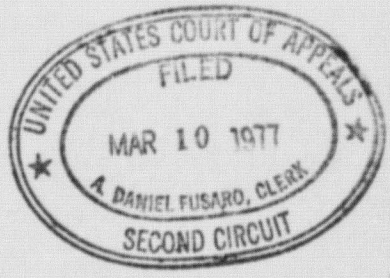
REPLY BRIEF FOR
DEFENDANTS-APPELLANTS



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Statement

This brief is submitted in reply to the Brief of Plaintiff-Appellee. We do not intend to reargue the evidence as if we were summing up to the jury as apparently plaintiff's counsel does. We do seek to highlight several matters therein, however.

ARGUMENT

I. Despite plaintiff's claims, this still is not a civil rights action.

Plaintiff claims that because he alleged the defendants improperly arrested him and used "force" in doing so and while in the police car for a few minutes,

one defendant trooper "punched" him*, with no evidence of "intent" to deprive plaintiff of any constitutionally protected civil right, he has a right to collect substantial compensatory and punitive damages.

However, in order to state a claim cognizable under section 1983, a plaintiff must show (1) that public officials have intentionally deprived him of a right secured by the federal constitution and (2) that such deprivation was effected under color of state law. Paul v. Davis, 424 U.S. 693, 696-697 (1976). While in Monroe v. Pape, 365 U.S. 167, 187 (1961), the Supreme Court did not require a showing that a public official being sued under section 1983 had specifically intended to violate a plaintiff's constitutional right, it did not dispense with the need to show that the conduct engaged in was intentional. In

* This was only claimed to be by Dainack although the judgment makes no distinction.

stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," Monroe was referring to its own facts showing intentional conduct by police officers so flagrant that they were bound to know it would, as a "natural consequence," deprive plaintiffs of their constitutional rights.

Certainly the complaint does not allege and the proof does not show that defendants intended to deprive plaintiff of any protected civil right. In arresting plaintiff, defendants conceivably may have been negligent and may have used "force" not absolutely necessary in light of latter developments but, at most, this was negligence.* The complaint and the evidence make no showing of intent on the part of defendants.

Paul v. Davis, supra at 701, as noted in our Main Brief, p. 8, rejects any notion that 42 U.S.C. § 1983 made actionable all common-law torts

* As to the alleged blow or "punch" in the police car, it should be noted Van Houten had nothing to do with it, yet is required by the judgment to pay compensatory damages of $4,000 equally with Dainack as well as punitive damages of $2,000 to include all the conduct.

engaged in by state officials. Concern was indicated lest "the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle" be thought to have claims under section 1983. Id. at 698. The majority rather clearly indicated that negligent torts were singularly inappropriate for application of section 1983. Id. at 698-699. Moreover, the dissent did not contest the majority's evident disapproval of negligence as a basis of section 1983 liability. (424 U.S. 693, 717.)

Obviously a de minimus situation, as in the instant case, ought not be converted into a standard of strict liability, with disastrous results to governmental operations and police efficiency. See Jenkin v. Meyers, 338 F. Supp. 383 (N.D. Ill., 1972), affd. 481 F. 2d 1406 (7th Cir., 1973).

A short word as to plaintiff's claim (Brief, p. 11) that 42 U.S.C. §§ 1985 1986 apply to this case: While it is true the complaint (2a)* states the action is brought pursuant to those

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* Vol. 1 - Joint Appendix.

sections as well as § 1983, the plaintiff never asked the trial court to charge §§ 1985, 1986 (indeed his counsel never presented any requests) and the charge of the court (T. 303-324, 307) is barren of any claim of plaintiff of conspiracy (§ 1985) or neglect to prevent violation (§ 1986).

There is also a good legal reason why § 1985(3) (the only subsection possibly relevant) is inapplicable. § 1985(3) requires as an essential element "the kind of invidiously discriminating motivation stressed by the sponsors of the limiting amendment." Griffin v. Breckinridge, 403 U.S. 88, 101-102 (1971). This requires that "there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." Id., 102. See also Barrett v. United Hospital, 376 F. Supp. 791, 806 (S.D.N.Y., 1974), affd. 506 F. 2d 1395 (2d Cir., 1974).

The complaint and record herein utterly fail to allege or show any such class-based animus of any kind. Thus no cause of action under § 1985 was made out, regardless of whether defendants'

"conspired" in anyway, which is preposterous in view of the spur-of-the moment nature of the whole incident in question.

As to § 1986, unless a valid claim is made out under § 1985, none exists under § 1986. Barrett v. United Hospital, supra, ibid. at 806, ftn. 70. See also Post v. Payton, 323 F. Supp. 799 (E.D.N.Y., 1971).

II. The claim that defendant did not except to the charge does not prevent this Court from reversing.

Plaintiff's brief contends in reply to Point II of our main brief that defense counsel took no exception to the charge (p. 28) and therefore there is no basis for appellate review (p. 38). No authority is cited for the proposition.

In point of law, such a claim hardly squares with applicable cases. It flows from the "sporting" theory of law. We submit that the errors of the trial court are "plain and may result in a miscarriage of justice." Williams v. City of New York, 508 F. 2d 356, 362 (2d Cir., 1974). The interests of justice require reversal of the judgment.

The rule appellee proffers is not "inexorable" and is subject to exception. Pritchard v. Liggett & Myers Tobacco Co., 350 F. 2d 479, 486 (3rd Cir., 1965), cert. den. 382 U.S. 987, mod. 370 F. 2d 95. It is sufficient that a miscarriage of justice may have resulted from the error.*

Plaintiff's brief also ignores Defendants' Requests to Charge (A20 - A35).** Therein defendants did request the law to be properly charged. In those requests (A29 [#39a], A33 [#s 55, 56] and others) the defendants sought what plaintiff now claims was not. It should also be noted that plaintiff failed to submit any "requests."

*The record also shows likely perjury by plaintiff (44a - 46a). While we have not made this a separate point for a new trial, the totality of circumstances and the trial court's failure to even hold a hearing was an abuse of discretion, at the very least. (88a - 89a).

**Numbers in parenthesis refer to Vol. 1 of Appendix.

III. Damages are totally out of proportion to the evidence.

Plaintiff has utterly failed (p. 38, et seq.) to refute the fact that the damages herein were nominal (90a). The brief simply argues the cases defendants cited, "each had their own peculiar set of facts. . ." (p. 40). Of course every case or action has "peculiar" facts and we might add that our failure to find a case with the same set of "facts" as plaintiff did not flow from any lack of searching. It probably results from the fact that few plaintiffs would deign to institute a federal action with such obviously nominal damages and doubtful federal jurisdiction (supra, Main Br., Point I).

Plaintiff continues to argue he was entitled to punitive damages simply because he was arrested improperly and "set upon" by defendants without justification. Most curiously (p. 43) he argues that being immediately released by defendants, is a justification for punitive damages. In other words, an act of defendants that benefited plaintiff, a total and unconditional release from custody was "malicious,"

etc. Indeed it completely negates any malice, wantonness or overbearing. The lack of physical or emotional injury also strongly points up the lack of any basis for punitive damages.

Damages, in the end, must have some rational basis and plaintiff's own posture that he suffered no physical or emotional damage contradicts any claim that damages, even as reduced, were not grossly and inordinately excessive. The award of punitive damages was unjustified in the record and its only "deterrent effect" will be to prevent police officers from performing their lawful function.* While no policeman has a right to assault an arrestee (as a matter of state tort law), often times some force must be

* Since § 1983 recovery requires, supra, I, some intentional conduct of a servere nature, such a showing without more, i.e. a gravely extreme and malicious act, there was no basis to award punitive damages. Even if there was a showing of wantonness, overbearing and maliciousness this would at most simply support § 1983 liability, it would not support the punitive damages in the instant case.

applied in the performance of duties. The defendants herein never applied such "force" with the intention of injuring plaintiff. The level of "force" was so low as to negate any constitutional significance. The proof of that is that plaintiff was not injured. Plaintiff may use words such as "vicious" and "malicious" but they are meaningless when the undisputed facts in the record are reviewed.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED, ETC.

Dated: New York, New York
March 10, 1977

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Appellants herein. On the 10th day of March , 1977 , she served the annexed upon the following named persons :

ROSEN & ROSEN, ESQS.
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Monticello, New York 12701

Attorneys in the within entitled by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Constance Trezza

Sworn to before me this
10th day of March , 1977

R. Seth Greenwald
Assistant Attorney General
of the State of New York